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BRIEF OF DEFENDANT IN ERROR

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 105.

ERNEST GATEWOOD,

PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA,

DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of North Carolina.

WALTER CLARK, Jr.,

ACTING ATTORNEY-GENERAL OF NORTH CAROLINA,

FOR DEFENDANT IN ERROR.

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 105.

ERNEST GATEWOOD,

PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

STATEMENT OF THE CASE.

An act of the General Assembly of North Carolina, to-wit, Laws of 1905, chapter 538, made it criminal to operate a "bucket-shop" or to buy or sell for future delivery without intending any actual delivery. The only question presented is whether section 7 of the said act renders the entire act void, as being in conflict with the Fourteenth Amendment of the United States Constitution.

Section 7 is as follows:

> "That this act shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising, in the purchase or sale of the necessary commodities required in the ordinary course of their business."

ARGUMENT.

The State contends:

1. That this 7th section does not conflict with the Fourteenth Amendment of the United States Constitution guaranteeing equal protection of the laws.

Now if the section in dispute had been cut off, thus, "This act shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising," this might have been class legislation, exempting certain persons, and therefore unconstitutional. But this is not the whole of the section. It contains the following words, also: *"in the purchase or sale of the necessary commodities required in the ordinary course of their business."* This gives these classes no right not given to every one else. This section was added out of superabundant caution. It simply gives these classes the right to buy or sell for actual future delivery. The act does not prevent any one from buying for actual future delivery, but makes it criminal for any person, firm, etc., to buy on margin for future delivery when no actual delivery is intended.

As the Supreme Court of North Carolina in its opinion, 138 North Carolina Report, page 729, said:

> "A purchase for actual future delivery of necessary commodities required in the ordinary course of business, and not for 'wagering' or gambling on the fluctuations of the market, would not be against the statute. The statute of this State does not prohibit all purchases or sales for future delivery, but only such dealings as are in the nature of gambling or wagering contracts. Though section 7 mentions only manufacturing and wholesale mercantile establishments as authorized to make *bona fide* dealings in 'futures,' this was done unnecessarily, we think, and only out of abundant caution. It is not a discrimination, for there

is no prohibition upon any one else or any other business to buy commodities for future delivery *bona fide* in the 'ordinary course of such business,' when not for speculative or gambling purposes. That no other business or persons are mentioned as authorized to deal *bona fide* for the purchase of commodities on 'margin,' is not an implied restriction upon others to do an act not forbidden by any statute.

"Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the Act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the Act of 1905 to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business."

Counsel for the plaintiff in error, relying upon *Connolly v. Union Sewer Pipe Co.*, 184 U. S., p. 540, contend that section 7, hereinbefore quoted, rendered the Act of 1905 unconstitutional. We submit that this contention cannot be sustained, and that the *Connolly case* can be distinguished from the case at bar. In that case the Illinois Trust Act of June 20, 1903, was involved. The first section of the said act embraced *all* persons, firms, or corporations entering into combinations prohibited by the statute, while the 9th section declared that the act should not apply to *agriculturists or live-stock dealers* in respect to their products or stock in hand. If the Act of 1905 had said that *all* persons conducting bucket-shops shall be guilty of a misdemeanor, except *manufacturers or wholesale merchants*, who may be permitted to conduct such enterprises, the doctrine of the *Connolly case* might be invoked, for it would then appear that the Legislature clearly intended that manufacturers and wholesale merchants should be permitted to conduct bucket-shops, while *all* other persons were denied this right. The reason given by this Court in declaring that section 9 rendered the Illinois Trust Act unconstitutional was that the Legis-

lature would not have enacted such a statute *"unless agriculturists and live-stock dealers were excluded from its operation, and thereby protected from prosecution."* Can this Court hold that it was the purpose of the General Assembly of North Carolina in the enactment of section 7 of the Law of 1905 to exempt manufacturers and wholesale merchants from the provisions of the law forbidding the keeping of bucket-shops to permit them to carry on such illegal enterprises and "protect them from prosecution"? This clause was inserted for the purpose of emphasizing the fact that it was not the intention of the General Assembly to affect, by any attempted legislation, contracts of manufacturers or wholesale merchants in the purchase or sale of the necessary commodities required in ordinary course of their business, entered into in good faith and with an actual intention of fulfilment.

The Legislature did not intend to impose any restrictions upon legitimate commerce, but only to destroy the parasite which infests it.

The Constitution of California renders void all contracts for the sale of stocks or margins to be delivered at a future day. It was contended that this constitutional provision did not discriminate between legitimate and illegitimate transactions, and that the same was contrary to the Fourteenth Amendment. The Supreme Court of that State, however, in *Parker v. Otis,* 130 Cal., 322, 329, said:

> "If the provision in question on its face fails to distinguish between *bona fide* contracts and gambling contracts, as is urged, it is none the less a proper police regulation, for the question remains to be determined in each case whether the transaction is in contravention of the Constitution. * * * The Court will always see that legitimate business transactions are not brought under the ban."

And in *Fortenbury v. State,* 47 Ark., 188, the Arkansas statute "was interpreted as applying only to fictitious transactions."

It is submitted that the evident purpose of the Legislature was not to authorize persons engaged in the business of manufacturing or wholesale merchandising to open a place for the purpose of conducting a bucket-shop and carrying on the business of entering into contracts forbidden by the Act of 1889; but the intent was simply to authorize such persons to buy or sell for actual delivery in the future "the necessary commodities required in the ordinary course of their business." As was said in *Connor v. Black,* 119 Mo., 126, the legislation is directed "at keepers of bucket-shops and to individuals or companies engaged in dealing in futures and gambling in grain and other articles of commerce, and *was not designed to affect transactions between commission merchants, their customers and patrons.*"

Inasmuch as section 7 does not confer upon the excepted classes any privileges which they did not before possess, it might be entirely eliminated and the intent of the Legislature in the enactment of the statute preserved.

The State contends:

2. That under the construction put upon this act by the Supreme Court of North Carolina, there is no Federal question presented, as by this construction the act is clearly constitutional. See *State v. McGinnis,* 138 N. C., 724, and *State v. Clayton,* 138 N. C., 732, in which this act was construed. In the present case, *State v. Gatewood,* a *per curiam* order was entered, following the construction placed on the statute by the foregoing decisions, which were filed at the same time.

The decisions of this Court seem to be uniform that when the construction of an act is in doubt and the highest State Court construes it so that it is constitutional, and no Federal question is raised, the Supreme Court of the United States has no juris-

diction. *The plaintiff in error has taken the peculiar position that the State Supreme Court has no right to construe an act so that it is constitutional, and that if it does so construe it, the Supreme Court of the United States should overturn this construction and construe it so that it is unconstitutional, and therefore void.*

In 9 Cranch, 87, *Polk's Lessee v. Wendal,* the Court said:

> "In cases depending on the statute of a State, and more especially in those respecting titles to lands, the Federal courts adopt the construction of the State where that construction is settled and can be ascertained."

In *Elmandorf v. Taylor,* 10 Wheaton, 152, the Court said:

> "The courts of the United States, in cases depending on the laws of a particular State, will, in general, adopt the construction which the courts of the State have given to those laws. This course is founded upon the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

In *Green v. Neal,* 31 U. S., 291, it was said:

> "This Court has uniformly adopted the decisions of the State tribunals respectively in the construction of statutes."

In *Davie v. Briggs,* 97 U. S., 638, *Justice Harlan,* after quoting numerous authorities, said:

> "Consequently, our duty is, without reference to our former decisions, to adopt, in this case, the construction which the Supreme Court of North Carolina has given to the limitation statute of that State."

Justice Brewer in *Louisville, etc., Railway Co. v. Mississippi*, 133 U. S., 587, said:

> "The construction of a State statute by the highest court of the State is accepted as conclusive in this Court."
>
> "Where the construction given to a State statute by a State court eliminates the Federal question, the United States Supreme Court has no jurisdiction." *Powell v. Brunswick Co.*, 150 U. S., 442.
>
> "We are bound to accept this conclusion of the State Court as to the proper construction of the statute of the State." *Baltimore Traction Co. v. Baltimore Belt R. R.*, 151 U. S., 137.

The questions just stated are questions of local law, and in determining whether the statute violates any right secured by the Federal Constitution, we must, in the particulars named, accept the interpretation put upon it by the State Court. 180 U. S., p. 466, *Cargill Co. v. Minn.*

It is respectfully submitted that the statute, especially as it has been construed by the Supreme Court of North Carolina, violates no provision of the Constitution of the United States, and that the judgment of that Court should be affirmed.

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